IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 15, 2005Session

CHERRYLE E. SEXTON v. JIM K. DUNCAN, ET AL.

Appeal from the Circuit Court for Rutherford County
No. 44203 Robert E. Corlew III, Judge

No. M2004-01142-COA-R3-CV - Filed August 19, 2005

This is an appeal from the granting of defendant's motion for summary judgment in a wrongful death action filed by the plaintiff, widow of Charles B. Sexton, against the estate of Lester W. Martin. Both Mr. Sexton and Mr. Martin were employed by LoJac Enterprises, Inc. (LoJac), and were traveling from a job site to their residences when they were involved in an automobile accident resulting in their deaths. The vehicle in which they were traveling was owned by LoJac, was assigned to Mr. Sexton but was being operated by Mr. Martin. The plaintiff, Mrs. Sexton, received workers' compensation benefits as the result of the death of her husband. The trial court, having determined that Martin was acting within the course of his employment with LoJac, granted motion for summary judgment filed in behalf of the Martin estate based upon the exclusive remedy provisions of Tennessee Code Annotated § 50-6-108. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ, joined.

Roger S. Waldron, Murfreesboro, Tennessee, for the appellant, Cherryle E. Sexton.

David J. Sneed, Brentwood, Tennessee, for the appellee, Jim K. Duncan, Administrator Ad Litem for the Estate of Lester W. Martin.

OPINION

On December 11, 1999, a motor vehicle accident occurred on Highway 96 in Rutherford County, Tennessee. A vehicle operated by Lester W. Martin crossed the centerline of the highway and struck an on-coming vehicle. Charles B. Sexton was a passenger in the vehicle being driven by Mr. Martin. Both men died as a result of the accident.

Both Mr. Sexton and Mr. Martin were employed by LoJac Enterprises, Inc. The vehicle was owned by LoJac and was assigned to Mr. Sexton for use in traveling to and from various job sites and for work related errands at the job sites. LoJac anticipated that the vehicle would be operated by other LoJac employees under the supervision of Mr. Sexton for company business. Mr. Sexton was the foreman of a crew that laid the aggregate rock which served as a base for highway pavement and also laid shoulder stone after paving was completed. On the date of the accident, Mr. Sexton and Mr. Martin were returning from a job site near Santa Fe in Maury County, Tennessee, some 56 miles from Murfreesboro, where they both lived. At the time of the accident, Mr. Martin was operating the vehicle.

Mr. Sexton had been Mr. Martin's supervisor for several years prior to the accident and routinely transported Martin to job sites where they were working. When Sexton missed work due to a vacation or for some other reason, the truck was often left with Mr. Martin for his use in going to and from work. On occasion, Mr. Sexton would also provide transportation for other LoJac employees. This practice benefitted LoJac by assuring the employees would be at work on time and benefitted the employee by saving them transportation expenses.

Following the death of her husband, Mrs. Sexton received the workers' compensation benefits provided for the dependents of a deceased worker whose death arose out of and during the course of his or her employment. She subsequently filed a tort action against the estate of Lester Martin. The trial court granted a motion for summary judgment filed in behalf of the estate finding that Mrs. Sexton's claim was barred by the exclusive remedy provisions of Tennessee Code Annotated section 50-6-108. Mrs. Sexton has appealed from the trial court's action.

Upon appeal from a summary judgment order, the standard of review is controlled by Rule 56, Tenn. R. Civ. P. Where, as in this case, the facts are not in dispute, the question on appeal is one of law, and our scope of review is de novo with no presumption of correctness accompanying the trial court's conclusions. *Union Carbide Corp. v Huddleston*, 854 S.W.2d 87 (Tenn. 1993); *Smith v. Norris*, 218 Tenn. 329, 403 S.W.2d 307 (1966).

Our workers' compensation laws have an exclusive remedy provision that is found in Tennessee Code Annotated section 50-6-108(a) and provides:

> (a) The rights and remedies herein granted to an employee subject to the Workers' Compensation Law on account of personal injury or death by accident, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of such employee, such employee's personal representative, dependents or next of kin, at common law or otherwise, on account of such injury or death.

Tennessee Code Annotated section 50-6-112(a) provides, however, that when the injury or death is caused "under circumstances creating a legal liability in some person other than the employer" the injured worker has the right to workers' compensation benefits and may also pursue their remedy against the other person. Our courts have interpreted this statute to exclude a co-employee acting

within the course of his or her employment as being "some person other than the employer" even though the co-employee negligently causes an injury. *Taylor v. Linville*, 656 S.W.2d 368 (Tenn. 1983); *Majors v. Moneymaker*, 196 Tenn. 698, 270 S.W.2d 328 (1954).

In determining that Mrs. Sexton's tort claim was barred by the exclusive remedy provisions of Tennessee Code Annotated § 50-6-108, the trial court found that both Lester Martin and Charles Sexton were acting within the course and scope of their employment with LoJac. The appellant, Mrs. Sexton, disagrees with the finding as it applies to Lester Martin.

Generally, injuries sustained by an employee while traveling to or from work are not considered within the course of employment unless they occur on the employer's premises. *Howard v. Cornerstone Med. Assoc., P.C.*, 54 S.W.3d 238 (Tenn. 2001). Travel to and from work, ordinarily, is not considered a risk of employment but falls into the group of those things a worker must do in preparation for the work day.

An exception to this general rule applies when the employer provides transportation to the employee as an incident of the employment. This exception applies both where the employer provides a company car to the employee to use going to and from work and where the employer reimburses the employee for travel expenses incurred by the use of the employee's own vehicle. *Pool v. Metric Constructors, Inc.*, 681 S.W.2d 543 (Tenn. 1984); *Eslinger v. F & B Frontier Construction Co.*, 618 S.W.2d 742 (Tenn. 1981). "[W]here transportation is furnished by an employer as an incident of the employment, an injury suffered by an employee while going to or returning from work in the vehicle furnished arises out of and is within the course of employment." *Eslinger*, 618 S.W.2d at 744.

In the present case, it is not disputed that transportation was being provided Mr. Martin by LoJac. While the vehicle was assigned to Mr. Sexton, the practice was to provide Mr. Martin with transportation to and from LoJac's various job sites. Analytically, there seems to be no significance with regard to the facts that Mr. Martin, rather than Mr. Sexton, was driving the vehicle and that he was not paid for his time while traveling. On those occasions when Mr. Sexton was on vacation and left the truck for Mr. Martin to use, Mr. Martin clearly would fall within the exception to the general rule that applies where the employer provides transportation. He would be considered in the course of his employment while going to and from work even though he was not paid for his time traveling. Similarly, on those occasions, Mr. Martin was driving the vehicle. Placing Mr. Sexton in the vehicle would not cause a different result. Mr. Sexton had the authority to allow and even to direct other persons under his supervision to operate the vehicle for company business including going to a store for lunch and traveling to and from job sites. The fact that Mr. Sexton allowed Mr. Martin to operate the vehicle from the job site back to their homes in Murfreesboro, Tennessee, does not change the fact that transportation was being provided by the employer, LoJac. We agree with the trial court that both Mr. Martin and Mr. Sexton were in the course of their employment during the return trip from the Maury County job site.

IV. CONCLUSION.

Since we find the Lester Martin was acting within the course of his employment with LoJac Enterprises, Inc., at the time of the accident resulting in the death of Charles Sexton on December 11, 1999, the claim against Lester Martin's estate is barred by the provisions of Tennessee Code Annotated § 50-6-108. The judgment of the trial court granting defendant's motion for summary judgment is affirmed and this matter is remanded with costs of appeal assessed against the appellant, Cherryle E. Sexton.

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DONALD P. HARRIS, SENIOR JUDGE